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No. 81-2188

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW MEXICO, NORTH DAKOTA, ALASKA, NEVADA, UTAH AND IDAHO AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Do provisions in the State of Montana's Constitution and Enabling Act which disclaim jurisdiction over Indian lands prohibit Montana state courts from exercising jurisdiction to adjudicate water rights claimed by the United States on behalf of Indian Tribes?

Did the Montana Federal District Court correctly determine that factors of wise judicial administration warrant dismissal of a piecemeal federal court action in favor of comprehensive adjudication of all conflicting water rights in Montana state courts?

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INTEREST OF AMICI

The Western States participating in this brief have the strongest of interests in urging the granting of the Petition for Certiorari and ultimately the reversal of the Ninth Circuit Court of Appeals. These states all have vast acreages of federal lands within their boundaries. All consider water their lifeblood and have established elaborate systems to allocate water within their boundaries. For years these states have been involved in stream adjudications. At least since this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), as confirmed in *Jicarilla Apache*

Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), *cert. denied*, 444 U.S. 995 (1979), these states have assumed that they could proceed to adjudicate federal water rights, including Indian reserved water rights in state court. The Ninth Circuit decision now tells these states that state adjudication is not possible. The effect for the *amici* states is chaos—the states and their citizens are subjected to duplicative litigation in state and federal forums, with inevitable inconsistencies and expense to water claimants. Those claimants who believe they have a final decree, in whatever forum, are certainly mistaken, for each decree is subject to attacks and prolonged dispute.

Congress has traditionally deferred to the state systems of allocating water within states' boundaries. Until 1952, it was not possible to join the United States as a party in water right adjudications because of the doctrine of sovereign immunity. Congress has acknowledged that failure to join a known interested party to adjudicate relative water rights is a jurisdictional defect which invalidates the proceeding. *Dugan v. Rank*, 372 U.S. 609 (1963), *Miller v. Jenkins*, 243 F.2d 157 (5th Cir. 1957), *cert. denied*, 355 U.S. 827 (1957). The problem caused by the sovereign immunity of the United States was noted in a Senate report:

> If a water user . . . is immune from suits and proceedings in the court for the enforcement of valid decrees, then the years of building the water laws of the Western States . . . to effect honest, fair and equitable division of the public waters will be seriously jeopardized. Senate Report No. 755, 82nd Cong. 1st Sess. (1951) at 5.

Congress cured this problem by passing Senate Bill 18, which was accompanied by the report cited above, and which is now codified at 43 U. S. C. § 666, commonly called the McCarran Amendment. Through this statute Congress gave its consent to "join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system . . . " Thus, the way was paved for joining all potential claimants in general water right adjudications.

This Court in *Colorado River* recognized the necessity of the adjudication of *all* water rights, including Indian reserved water rights held by the United States as trustee, in a single state forum. This Court rejected an argument accepted by the Ninth Circuit Court of Appeals that Indian water rights were not included in the McCarran Amendment, stating:

> . . . bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the [McCarran] amendment excluding those rights from its coverage would enervate the amendment's objective. 424 U. S. at 811.

The lower court's decision that Montana state courts may not adjudicate Indian water rights jeopardizes the *amici* states' ability to continue to administer their water laws in the manner recognized as essential by this Court, as well as by Congress. The ruling is contrary to the decisions of this Court interpreting the McCarran Amendment and creates a clear conflict with the decision of the Tenth Circuit in *Jicarilla Apache Tribe*. The *amici* respectfully urge this Court to grant Montana's Petition for Certiorari in this case, and to reverse the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with the Decisions of This Court Interpreting the McCarran Amendment and Is Expressly Contrary to a Decision of the Tenth Circuit Court of Appeals.

I. Disclaimer Provisions

A. Colorado River Water Conservation District v. United States

This Court held unequivocally in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), that the McCarran Amendment evinced an objective of avoiding piecemeal adjudications. After analyzing the language of the Amendment itself, as well as its underlying policy, this Court found that excluding Indian water rights from its coverage "would enervate the Amendment's objective." 424 U.S. at 811. This Court held that all federal water rights, including those held by the United States on behalf of the Indians, must be subject to state jurisdiction in general stream adjudication.

The Ninth Circuit in this case distinguished Montana state courts from those of Colorado on the basis that the Montana Constitution and Enabling Act contain language disclaiming "all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes" and providing that such lands shall "remain subject to the disposition of the United States, . . . (and) under the absolute jurisdiction and control of the Congress of the United States. . . ." Enabling Act of Montana February 22, 1889, 25 Stat. 676; Montana Constitution, Ordinance No. I (1889). According to the lower court, this language

deprived Montana state courts of subject matter jurisdiction. This interpretation of the disclaimer language disregards this Court's holding in *Organized Village of Kake v. Egan*, 369 U. S. 60 (1962).

This Court recognized in *Kake* that the Western States' disclaimer provisions were disclaimers of proprietary interests, not governmental interests. Interestingly, the Ninth Circuit previously agreed with this holding in *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274 (9th Cir. 1981). There the Ninth Circuit cited *Kake* and *Jicarilla* for the proposition that the enabling acts required states to disclaim only their proprietary interests in Indian land, not the states' governmental or regulatory authority over that land. 649 F. 2d at 1280.

It is clear that Congress has jurisdiction and control over land owned by the United States and held by it in trust for Indians, so that such lands always remain subject to disposition by Congress. State disclaimers are simply an acknowledgement that Congress has such plenary power over Indian property. Moreover, this principle applies in all 50 states, not just those with express constitutional disclaimers to that effect. *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515 (1832). It is precisely this plenary control which Congress exercised in enacting the McCarran Amendment to authorize the states to adjudicate reserved water rights of Indians held in trust by the United States. Nothing in the disclaimer language prevents the states from accepting and implementing this Congressional grant of regulatory jurisdiction relating to a vital area of state governmental interest.

Nevertheless, the Ninth Circuit chose in this case to create a substantial exception to the Congressional grant of jurisdiction provided by the McCarran Amendment, an exception which would indeed, in the words of this Court, "enervate the Amendment's objective." That objective is to provide for unified proceedings in a single forum which federally created rights will be determined in accordance with federal law and state created rights will be determined in accordance with state law. As this Court stated in *Colorado River*, "Indian interests may be satisfactorily protected under regimes of state law (citations omitted). The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights." 424 U. S. at 812-813 (1976). The Ninth Circuit Decision undermining this objective is in error.

B. Jicarilla Apache Tribe v. United States

The Ninth Circuit admitted that its decision in this case is expressly contrary to that of the Tenth Circuit in the case of *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir. 1979), *cert. denied*, 444 U. S. 995 (1979).

The Tenth Circuit in the *Jicarilla* case confronted the same challenge to state jurisdiction based on identical constitutional disclaimer provisions. Relying on this Court's decision in *Colorado River*, the court rejected the contention that the disclaimer provisions deprived New Mexico state courts of jurisdiction to adjudicate Indian claims pursuant to the McCarran Amendment. The Tenth Circuit determined that the McCarran Amendment grant-

ed to all states, including the nine western disclaimer states, subject matter jurisdiction in comprehensive proceedings to adjudicate federal claims to water rights, including those held on behalf of Indian tribes. The court determined that "there exists no conflict between state court assumption of jurisdiction governing general water rights adjudication . . . and the Disclaimer provisions . . .", since "the United States is the proper party to protect *all* federally reserved water rights, including those set aside for use by the Indian tribes." 601 F. 2d at 1131 (emphasis by the court). The court found the proposition that the disclaimer applies only to proprietary interests "particularly persuasive in light of the non-proprietary interest in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment." 601 F. 2d at 1133.

With respect to the application of Public Law 83-280, the Tenth Circuit relied on the express language of the law itself, as well as this Court's interpretation in *Colorado River*, P. L. 83-280, according to this Court, "does not purport to limit the special consent to jurisdiction given by the McCarran Amendment." Indeed, it is clear from the language of the Act itself that it is inapplicable to water right adjudications. Nevertheless, the Ninth Circuit criticized the *Jicarilla* decision for failing to recognize the distinction between disclaimer and non-disclaimer states which it claimed Congress had drawn in P. L. 83-280. Ironically, it is the Ninth Circuit decision which purports to create a disclaimer/non-disclaimer distinction in the McCarran Amendment, a distinction Congress did not see fit to make.

The result is a clear conflict between the Ninth Circuit and the Tenth Circuit on this critical issue of state court jurisdiction over Indian water rights. This conflict creates an untenable situation in the Western States which will effectively frustrate the efforts of many of these states to adjudicate all conflicting water rights. This is precisely the situation which Congress sought to correct in enacting the McCarran Amendment.

II. Factors of Wise Judicial Administration

A. Colorado River Water Conservation District v. United States.

As an independent basis for its ruling, the Ninth Circuit determined that the principles of "wise judicial administration" enunciated by this Court in the *Colorado River* case did not warrant dismissal of the federal action. In reaching this conclusion, the Ninth Circuit failed to consider the most important factor in this Court's analysis, and focused on other considerations never mentioned by this Court.

In *Colorado River*, this Court determined that federal and state courts have concurrent jurisdiction with respect to Indian water right. However, it held that factors of "wise judicial administration" warranted dismissal of the concurrent federal action in favor of state court proceedings for comprehensive adjudication of water rights. According to this Court, "the most important of these [factors] is the McCarran Amendment itself." This Court went on to say that "the clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. . . . Indeed, we have

recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings." 424 U. S. at 819.

The Ninth Circuit concluded that the federal proceeding would not be piecemeal. It reached this conclusion despite the fact that the federal actions omitted many water claimants and did not include large bodies of water. The Ninth Circuit ignored the fact that Montana offers comprehensive adjudication of *all* conflicting water rights in state courts under Montana law, in stark contrast to the limited federal actions.

The situation, then, is analogous to that considered by this Court in *Colorado River,* which involved a piecemeal federal action. Colorado, like Montana, had a comprehensive system for the adjudication of all water rights. Considering both these factors, and most importantly, the McCarran Amendment and its underlying policy, this Court determined that the district court's dismissal of the federal court action was appropriate. The Ninth Circuit erred by refusing to follow *Colorado River.*

B. Jicarilla Apache Tribe v. United States

In reaching its decision, the Ninth Circuit determined that the United States could not adequately represent the Indians due to a conflict of interest resulting from the United States' representation of other federal entities. Faced with such a conflict, the court concluded that in order to protect their own interests, the Indians would be necessary parties over whom the state court had no jurisdiction.

This was not one of the factors considered by this Court in the *Colorado River* case, despite the fact that the government asserted rights on its own behalf as well as on behalf of certain Indian tribes. Furthermore, the Tenth Circuit has expressly rejected the same conflict of interest argument.

In the *Jicarilla* case, the Tenth Circuit concluded that the United States was the proper party defendant to represent Indian tribes in adjudications involving reserved water rights. The court further noted that the Indians had the right of intervention through private counsel in such adjudications. Under such circumstances Indian water rights could be adequately protected. The Ninth Circuit refused to follow *Jicarilla* on this point, placing the two circuit courts of appeal in direct conflict on another issue of critical concern to the western states.

This Court pointed out the implications of the Ninth Circuit's holding in a footnote in the *Colorado River* case. Footnote 17 reads as follows:

> Indeed, if exclusion of Indian rights were the conclusion, conflicts between Indian and non-Indian rights, as well as practical matters of adjudication, might have the effect of requiring district court adjudication of non-Indian along with Indian rights, thereby effectively vitiating our construction of the amendment in *Eagle County* and *Water Division No. 5.* 424 U. S. at 811.

The Ninth Circuit's conclusion that Indian water rights can only be adequately protected in Montana federal district court portends the result envisioned by this Court, requiring district court adjudication of non-Indian along with Indian rights. Such a construction is entirely con-

trary to the objective of the McCarran Amendment. In the words of this Court, "the consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights . . ." 424 U.S. at 819. The Ninth Circuit's decision flies in the face of that policy and should be reversed.

CONCLUSION

The Western states joining this brief as *amici* are deeply concerned about the debilitating effect of the Ninth Circuit's ruling in this case. The western disclaimer states are completely incapable of proceeding with effective administration of their most important natural resource, and cannot rely upon piecemeal federal water adjudications to fill the void. The *amici* respectfully urge this Court to grant Montana's petition for a writ of certiorari and to reverse the Ninth Circuit Court of Appeals.

Respectfully submitted,

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